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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ROBERT JENKINS,

Defendant and Appellant.

D052448

(Super. Ct. No. SCN225198)

APPEAL from a judgment of the Superior Court of San Diego County,
Timothy M. Casserly, Judge. Affirmed.

A jury convicted George Robert Jenkins of petty theft (Pen. Code, §§ 484, subd. (a), 488) and he admitted having a prior theft-related conviction (*id.*, § 666). He also pleaded guilty to unauthorized possession of a hypodermic needle or syringe (Bus. & Prof. Code, § 4140) and providing false information to a peace officer (Pen. Code, § 148.9, subd. (a)). In addition, the trial court found true allegations that Jenkins had five prior prison convictions. (*Id.*, §§ 677.5, subd. (b), 668.) The trial court sentenced Jenkins to seven years in state prison, consisting of the middle term of two years for the

petty theft conviction, concurrent terms of 180 days each for the unauthorized possession of a syringe and providing false information convictions, and five consecutive one-year terms for the prior prison convictions.

Jenkins appeals, arguing his misdemeanor convictions for unauthorized possession of a hypodermic needle or syringe and providing false information to a peace officer should be reversed because his guilty plea was invalid. He also argues the trial court's judgment should be reversed because the evidence against him was obtained during an illegal detention. We affirm the judgment.

I

Loss prevention officer Amandia Wade observed Jenkins with a female companion in a department store in Carlsbad. Jenkins's companion put unpaid merchandise in her bag and left the store with Jenkins. Wade contacted Jenkins's companion outside the store and, with the assistance of loss prevention officer Carlos Diaz, Wade escorted Jenkins's companion to the loss prevention office inside the store. Jenkins asked Wade to give him the car keys in his companion's possession and followed them into the store. Jenkins indicated he wanted to go into the office with his companion; however, Diaz told him he could not do that, but could wait outside the office if he chose. Diaz also informed him he was not being detained and could leave whenever he wanted. Jenkins once again asked for the car keys in his companion's possession and Diaz indicated he would check on the matter.

By then, Carlsbad Police Officer Christie Heatherly had arrived and Diaz told her Jenkins was waiting outside the office and wanted the car keys in his companion's

possession so he could go home. Officer Heatherly asked if Jenkins had been seen taking anything and Diaz told her he had not. At that point, Officer Heatherly thought Jenkins was free to leave because he was not being detained for any reason. She approached him and said, "I'll escort you outside with the car keys, but do you mind if I pat you down?" Officer Heatherly was concerned because Jenkins was not known to her and was accompanying a person who had been detained for stealing. In addition, she is 5 feet 2 inches tall and weighs about 110 pounds, while Jenkins appeared to be a little over six feet tall and to weigh approximately 210 pounds.

At first, Jenkins hesitated in response to Officer Heatherly's request and he had what she described as a look of "oh, crap." Officer Heatherly joked with Jenkins and said, "Hey man, look at you, look at me. For my safety if I can just pat you down real quick and be out of here." Jenkins then consented to the pat down and, at the same time, turned his back to Officer Heatherly and reached down into his waistband. Officer Heatherly became alarmed because she thought Jenkins might be reaching for a weapon and her radio did not work in that area, so no one would know she was in trouble. She grabbed Jenkins right arm and held it. Jenkins immediately told her, "I have a shirt down my pants that I took from the store."

Officer Heatherly then told Jenkins not to move and to stay where he was. She explained to him that he was not under arrest, but she need to investigate what was going on and she was going to handcuff him while she did so. At that point, she saw a red shirt hanging out of Jenkins pants. She grabbed the shirt with her right hand as she was holding the handcuffs with her left hand. She knocked on the office door and asked

Wade if the shirt was from the store and Wade said, "Yes." The shirt was new and had a tag on the collar. Jenkins did not have a wallet, checkbook, credit cards, cash or any other means of paying for the shirt.

II

Just prior to commencing jury selection, the trial court made the following record of Jenkins's decision to plead guilty to the misdemeanor charges of unauthorized possession of a hypodermic needle or syringe and providing false information to a peace officer:¹

"THE COURT: All right . . . it's my understanding, [defense counsel], that your client was going to plead guilty to Counts Two [unauthorized possession of a hypodermic needle or syringe] and Three [providing false information to a peace officer]?"

"[DEFENSE COUNSEL]: That's correct, your Honor.

"THE COURT: He has been advised of his rights, understands, gives them up?"

"[DEFENSE COUNSEL]: Yes.

"THE COURT: We'll accept the plea to Count Two and Three. [¶] . . . [¶] I also notice there's an Amended Information. Has he ever been arraigned on the Amended Information?"

"[PROSECUTOR]: No."

¹ The record on appeal does not include a copy of the preliminary hearing transcript. The prosecution alleged that, after Jenkins admitted taking the shirt, he provided Officer Heatherly with a false name and birth date. However, because Jenkins has distinctive tattoos, the police were able to identify him by searching a parolee database. The prosecution also alleged that, during a search following his arrest, Jenkins told the searching officer he had two hypodermic needles in one of his pockets. The officer found the needles in the side rear pocket of Jenkins's shorts.

After clarifying the amended information made no substantive changes to the charges against Jenkins, the trial court proceeded:

"THE COURT: All right. Waive formal arraignment on the amended?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: We'll enter a not guilty plea on the amended. And then enter the guilty pleas on Counts two and three."

Jenkins contends his guilty pleas are invalid because he did not personally plead guilty. Jenkins also contends his guilty pleas are invalid because the trial court did not advise him of and obtain express waivers of his constitutional privilege against self-incrimination, right to jury trial, and right to confront witnesses. We conclude the first contention lacks merit because, in a misdemeanor case, a defendant may plead guilty either personally or through defense counsel. (Pen. Code, § 1429.) While we agree the trial court erred in the second respect, we conclude the error does not require reversal in this case.

Before accepting a guilty plea, the trial court must advise the defendant and obtain the defendant's express waiver of the defendant's constitutional privilege against self-incrimination, right to a jury trial, and right to confront witnesses. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*); *People v. Howard* (1992) 1 Cal.4th 1132, 1179 (*Howard*). This requirement applies to misdemeanors as well as felonies. (*Mills v. Municipal Court* (1973) 10 Cal.3d 288, 292.) If a trial court fails to advise the defendant of and obtain his express waiver of these rights (*Boykin-Tahl* error), the error requires reversal unless the record affirmatively

shows the defendant's guilty plea was voluntary and intelligent under the totality of the circumstances. (*Howard, supra*, 1 Cal.4th at p. 1175.) Consequently, when presented with *Boykin-Tahl* error, our role is to examine the entire record, not just the record of the plea colloquy, to determine whether the defendant's plea was given with an understanding of the rights waived and represents a voluntary and intelligent course among the alternative courses of action available to the defendant. (*People v. Mosby* (2004) 33 Cal.4th 353, 360-361 (*Mosby*).)

Cases dealing with *Boykin-Tahl* error have been either "silent-record" cases, where the record shows no express advisement or waiver of *Boykin-Tahl* rights, or "incomplete advisement" cases, where the record shows a partial advisement and waiver of *Boykin-Tahl* rights. (*Mosby, supra*, 33 Cal.4th at pp. 362-364; see also *People v. Christian* (2005) 125 Cal.App.4th 688, 695.) Appellate courts have generally reversed pleas or admissions in silent-record cases because there is insufficient information in the record for the court to infer the pleas or admissions were both voluntary and intelligent. (*Mosby, supra*, at pp. 361-362.) Jenkins contends this is a silent record case and should be reversed for the same reason.

Were our review confined to the record of the plea colloquy, Jenkins's argument would be persuasive. However, we are required to review the entire record and, after having done so, we have no difficulty inferring his guilty pleas were voluntary and intelligent.

Immediately preceding the guilty pleas, the trial court, defense counsel and Jenkins engaged in the following exchange:

"THE COURT: All right. There [are] a few things I wanted to put on the record before the jury came in. The first – I wanted to be clear at least what the offer previously had been in this case. It's my understanding the district attorney had offered a stipulated four years in prison for this case. And the defendant's looking at eight years from what I can see. Was that the offer previously from the People?

"[DEFENSE COUNSEL]: Yes, your Honor. And I did advise my client of that offer as well as what the maximum term is if he gets convicted.

"THE COURT: All right. And he understood that and wanted to go to trial?

"[DEFENSE COUNSEL]: That's correct.

"THE COURT: All right. Is that correct, sir?

"[JENKINS]: Yes, it is.

Immediately following the guilty pleas, the trial court granted defense counsel's request to exclude any evidence related to the misdemeanor charges during the trial on the petty theft charge. The trial court also excluded evidence of three photographs taken of Jenkins on the night of his arrest in part because of his guilty pleas. These photographs showed he has numerous tattoos and was wearing a jacket large enough to conceal the stolen T-shirt.

The trial court next addressed the use of Jenkins's prior convictions for impeachment:

"THE COURT: All right . . . With respect to the prior convictions for purposes of impeachment, it's my understanding your client's not going to testify, so that makes that issue moot. Is that correct, [defense counsel]?

"[DEFENSE COUNSEL]: Yes, your Honor.

"THE COURT: All right. If he changes his mind and decides to testify, we'll address the issue of the admissibility of the priors for purposes of impeachment. Mr. Jenkins, you understand you have the right to decide whether or not you testify in this case. With respect to all the other witnesses, it's up to the attorney to decide what witnesses to call and what defense strategy to use, but ultimately you get to decide whether you testify or not. She can advise you and should advise you whether to testify and the consequences of testifying, but you're the one that has the final say on that issue. Do you understand all of that.

"[JENKINS]: Yes, sir."

The trial court then addressed how Jenkins wanted to proceed with the trial of the prior theft-related conviction allegations and prior prison conviction allegations:

"[DEFENSE COUNSEL]: Your Honor, I discussed with the defendant and he's agreed – we're requesting to bifurcate the priors and have a court trial and he waives a jury trial on his priors. We also stipulated to the [Penal Code section] 666 allegation that in fact he did have a prior conviction, theft conviction, in 2003

"THE COURT: Okay. Well, it's not quite the same as a stipulation. I mean, he has to admit the prior for that not — the [Penal Code section] 666 prior to go to the jury or to not have it go to the jury. [¶] . . . [¶]

"[DEFENSE COUNSEL]: That's fine, your Honor, he's willing to do that. [¶] . . . [¶]

"THE COURT: All right. You understand, sir, by admitting the prior conviction, if you're found guilty of the petty theft, that would make the petty theft in this case a felony. Do you understand that, sir?

"[JENKINS]: Yes, sir.

"THE COURT: And then ultimately if all of the prior prison commitment allegations are found to be true, you could potentially be facing up to eight years in prison for these offenses. Do you understand that?

"[JENKINS]: Yes, sir. [¶] . . . [¶]

"THE COURT: But also by admitting the prior conviction, then you take those – the prior conviction allegations away from the jury; in other words, they won't be told about your priors in the case in chief[.] When the district attorney's trying to prove the petty with a prior, that won't go before the jury based on your admission. Do you understand that?

"[JENKINS]: Yes, sir.

"THE COURT: Before you can enter an admission, you must give up certain constitutional rights. You have the right to a speedy and public jury trial. Do you understand that right?

"[JENKINS]: Yes, sir.

"THE COURT: Do you give up that right?

"[JENKINS]: Yes, sir.

"THE COURT: You have a right to see, hear, and cross-examine witnesses. Do you understand that right?

"[JENKINS]: Yes, sir.

"THE COURT: Do you give up that right?

"[JENKINS]: Yes, sir.

"THE COURT: You have a right to remain silent and not incriminate yourself. By admitting the prior, you are in effect incriminating yourself. Do you understand that right?

"[JENKINS]: Yes, sir.

"THE COURT: Do you give up that right?

"[JENKINS]: Yes, sir.

"THE COURT: You have the right to present a defense on your behalf, to testify on your behalf and use the Court's subpoena power

to bring evidence and witnesses before the Court on your behalf. Do you understand that right?

"[JENKINS]: Yes, sir.

"THE COURT: Do you give up that right?

"[JENKINS]: Yes, sir.

"THE COURT: [Defense counsel], do you join in the waivers?

"[DEFENSE COUNSEL]: Yes, your Honor.

"THE COURT: Sir, it's alleged . . . you suffered a prior theft-related conviction within the meaning of Penal Code, section 666. Do you admit that prior conviction allegation?

"[JENKINS]: Yes, sir.

"THE COURT: All right. I'll accept the admission. With respect to the prior prison commit allegations, your attorney has indicated that she wants a bifurcated trial on those prior conviction allegations, and also that that would be a court trial, rather than a jury trial And I want to make sure you understand and agree to that. You understand you have a right to have a jury, [the] same jury make the determination as to whether you suffered those prior prison commits. Do you understand that right?

"[JENKINS]: Yes, sir.

"THE COURT: And do you give up that right and agree to a court trial?

"[JENKINS]: Yes, sir, I do."

Collectively, these pretrial exchanges demonstrate Jenkins not only knew of his *Boykin-Tahl* rights, but chose to exercise them and waive them to his advantage. His decision to plead guilty to the less serious misdemeanor charges was clearly part of a larger strategy to limit how much information the jury deciding the more serious felony

charge would learn about his pre- and post-arrest conduct and his history of theft-related crimes. Jenkins's extensive prior experience with the criminal justice system, which includes at least one other guilty plea, further supports the conclusion he was aware of and intentionally relinquished his *Boykin-Tahl* rights as to the misdemeanor charges. (*Mosby, supra*, 33 Cal.4th at p. 365.) Moreover, Jenkins never disclaimed the guilty pleas during the pre-trial exchange, even after being fully apprised of his *Boykin-Tahl* rights in connection with his admission of the prior theft-related conviction. He also never attempted to withdraw the guilty pleas at a later point, even though correspondence in the record shows he is sufficiently literate and articulate to have done so if he desired. Since the record unquestionably shows Jenkins's guilty pleas were a voluntary and intelligent course among the alternative courses of action available to him, we conclude the trial court's failure to expressly advise him of and obtain waivers of his *Boykin-Tahl* rights does not warrant reversal of his convictions for the misdemeanor charges.

III

Jenkins next contends the trial court's judgment should be reversed because the evidence against him was obtained during an illegal detention. More particularly, he contends Officer Heatherly detained him by telling him she was going to escort him to his car without giving him a choice in the matter and by conditioning the return of the car keys on his consent to be searched. Since Officer Heatherly admittedly did not have reasonable suspicion he had been engaging in criminal activity, he contends the detention was unlawful and vitiated his subsequent consent to be searched.

Jenkins may not raise this issue on appeal because he did not move to suppress the evidence or otherwise attempt to exclude the evidence on this ground in the trial court. (Pen. Code, § 1538.5) Recognizing the issue might be forfeited, Jenkins alternatively contends defense counsel provided ineffective assistance by failing to bring a suppression motion below. We find no merit to this contention.

"To make a showing of constitutionally inadequate representation by counsel when failure to seek suppression of evidence on a Fourth Amendment ground is asserted as the basis for the ineffective counsel claim, the party must establish that the Fourth Amendment claim had merit and that it is reasonably probable that a different verdict would have been rendered had the evidence been excluded. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 652, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, Jenkins has not established his Fourth Amendment claim has merit.

Police contacts with individuals fall into three broad categories: consensual encounters resulting in no restraint of liberty; detentions strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on liberty. Consensual encounters do not require reasonable suspicion of criminal activity and do not trigger Fourth Amendment scrutiny. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 123-124.) There is no bright-line distinction between a consensual encounter and a detention. However, a police officer has not "seized" an individual in the Fourth Amendment sense unless, in view of all the surrounding circumstances, a reasonable person would believe he or she was not free to

leave. (*People v. Verin* (1990) 220 Cal.App.3d 551, 556; *Ford v. Superior Court*, *supra*, at p. 124; see also *Florida v. Bostick* (1991) 501 U.S. 429, 438; *People v. Zamudio* (2008) 43 Cal.4th 327, 341.) "The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 821; *People v. Zamudio*, *supra*, at p. 341.)

Much of the force of Jenkins's Fourth Amendment claim rests on his characterization of the car and car keys as belonging to him when the record is ambiguous on this point. Even assuming the car and the car keys did belong to him and Officer Heatherly should have known this, the record does not show a reasonable person in his circumstances would have believed from Officer Heatherly's actions that he was not free to leave.

Before encountering Officer Heatherly, Diaz specifically told Jenkins that he was not being detained and could leave whenever he wanted. In addition, while Jenkins had asked both Wade and Diaz for the car keys, neither said whether they would give them to him. Consequently, when Officer Heatherly approached him about escorting him outside and giving him the car keys, a reasonable person in his circumstances would have believed she was attempting to facilitate his departure, not detain him. The fact Officer Heatherly may not have given Jenkins a choice about being escorted does not alter our conclusion. A reasonable person in his circumstances, who was going to be escorted from a place he wanted to leave to a place he wanted to go, would not believe he was being detained.

That Officer Heatherly asked for Jenkins's consent to a pat down search also does not alter our conclusion. To a reasonable person, being asked for permission to do something implies the ability to deny such permission. Jenkins obviously understood this since he hesitated before consenting to the search. In addition, Officer Heatherly pointed out to Jenkins their significant size difference and explained to him she needed to search him before escorting him to the car for her safety. A reasonable person would have expected a lone police officer to take safety precautions before escorting an unknown person to an unknown car in an unknown location.

Finally, we note Jenkins's Fourth Amendment claim is based on an incomplete factual foundation because there was no suppression hearing and the trial court precluded Officer Heatherly from testifying about all of the circumstances leading to his arrest. Had she been permitted to testify fully, the record suggests she would have testified she asked for his consent to a pat down search, not just because she did not know him and he was bigger than her, but also because he had skinhead and prison tattoos, he was wearing a baggy jacket that concealed his waistband, Wade told her he wanted the car keys because he and his companion had left a baby in the car, and his companion said she stole the store's merchandise for him. All of these facts, had they been offered, admitted, and credited at a suppression hearing, would have further undermined Jenkins's Fourth

Amendment claim and further supported defense counsel's decision not to pursue a suppression motion.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

IRION, J.